Supreme Court of the United States

October Term, 1960.

No.

VICTOR CARLUCCI, JOSEPH GIORDANO, DANIEL HANNA, JOSEPH MERCOLA, NORMAN HOLTMAN, STUART SUTOR,

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

VICTOR CARLUCCI, JOSEPH GIORDANO, DANIEL HANNA, JOSEPH MEROLA, NORMAN ROTHMAN, STUART SUTTER,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit affirming the judgments of the United States District Court for the Western District of Pennsylvania which had sentenced petitioners for conspiracy to transport firearms stolen from the government of the United States and for various substantive offenses involving knowing possession and transportation of such firearms.

OPINIONS BELOW.

The Opinion of the Court of Appeals has not yet been reported. One copy of it constitutes Appendix "A" to this Petition for a Writ of Certiorari. One copy of the Dissenting Opinion of Circuit Judge Hastie (in which Chief Judge Biggs and Circuit Judge Kalodner joined) is attached hereto as Appendix "B".

JURISDICTION.

The judgments of the Court of Appeals were entered on March 2, 1961. On March 15, 1961, Mr. Justice Brennan (on application by petitioners) extended the time within which this Petition might be filed to include May 1, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Rule 22(2). The case had been argued before a panel on March 24, 1960. On the Court's motion it was reargued before the Court en banc on November 17, 1960.

QUESTIONS PRESENTED.

1. Should the convictions be set aside because the courts below failed to apply *Marshall v. United States*, 360 U. S. 310, 79 S. Ct. 1171?

2. Was the conspiracy charge used in order to convict persons as to whom there was no evidence of guilty knowledge?

3. As to petitioner Giordano, does not the decision of the Court of Appeals conflict with the decisions of other Circuits and constitute a serious threat to fairness in the administration of justice by permitting conviction of conspiracy upon mere guess and conjecture?

4. Was there sufficient evidence against any of the defendants?

CONSTITUTIONAL, STATUTORY, AND PROCEDURAL RULES PROVISIONS INVOLVED.

General Conspiracy Statute, 18 U. S. C. 371.

"If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE.

This criminal case arises out of two indictments, a seven count indictment found in the Western District of Pennsylvania at No. 15750 Criminal against all of the petitioners, and a nine count indictment returned in the Northern District of West Virginia against petitioner Stuart Sutor alone at No. 16023 Criminal. The Western Pennsylvania indictment charges conspiracy and substantive counts involving transportation, receipt, export and possession of stolen firearms. The seventh count of the Western Pennsylvania indictment charges petitioners with a conspiracy to violate the laws of the United States, Title 18 U. S. C. A. 371. The laws of the United States involved are as follow:

1. Title 15 U. S. C. A. § 902(g) and Title 18 U. S. C. A. § 2—transporting or causing to be transported in interstate commerce property stolen from the U. S. Government.

2. Title 18 U. S. C. A. § 641 and § 2—receiving and concealing with intent to convert to their own use and gain property stolen from the U. S. Government.

3. Title 18 U. S. C. A. § 2314 and § 2—transporting in interstate or foreign commerce goods valued at $5,000.00 or more knowing the same to have been stolen.

4. Title 22 U. S. C. A. § 1934—engaging in the business of exporting firearms without having registered with the Secretary of State or his delegate, and without having paid the registration fee prescribed by Subsection (3) of Title 22 U. S. C. A. § 1934.

5. Title 26 U. S. C. A. § 5851—unlawful to receive and possess designated firearms without payment of transfer tax as provided in § 511, Title 26 U. S. C. A.

6. Title 26 U. S. C. A. § 5855 and 18 U. S. C. A. § 2—charging shipping, carrying and delivering in interstate commerce designated firearms without complying with the

regulations stated in Title 26 U. S. C. A. § 5841, § 5814, and § 5821 requiring that designated firearms be registered, proper stamp affixed to the order and proper stamp affixed to declarations.

The West Virginia indictment charges only substantive counts involving transportation, possession, concealment, exporting, etc. of stolen and unregistered firearms.

The remaining counts in the Western Pennsylvania indictment charge petitioners Carlucci and Hanna, with the substantive crimes above set forth. Petitioner Giordano was charged in the fifth count with the substantive crime of shipping unregistered and untaxed firearms. Petitioners Merola and Hanna were charged only in the conspiracy count.

The West Virginia indictment was transferred to the Western District of Pennsylvania and the two indictments were consolidated for trial before Honorable Roger T. Foley, retired, specially presiding, and a jury.

Petitioners filed timely motions for judgments of acquittal which motions were denied by the Trial Judge. Upon the close of all the evidence, the petitioners renewed motions for judgments of acquittal (T. 1200-1201).

The jury returned a guilty verdict on all counts in both indictments. Motions for New Trial and Arrest of Judgment were summarily refused by the Court and all petitioners were immediately sentenced to prison.

The Government's facts are as follows:

On November 4, 1958, at about noon, a twin beechcraft airplane No. N 7165 C landed at the Morgantown Airport, Morgantown, West Virginia. At the request of the U. S. Border Patrol Agents, the plane was detained and the pilot, petitioner Sutor, was arrested by the West Virginia State Police (8b). After the arrest a search of the plane revealed the following cargo: Ninety-two (92) .30 caliber M-1 rifles, twenty-four (24) .30 caliber carbines, four (4) .45 caliber machine guns and one (1) .22 caliber rifle. All the guns were packed in burlap sacks (16b). The proof was that the

above guns were stolen on October 14, 1958, from the Ohio National Guard Armory at Canton, Ohio (34b). Two (2) dismantled .50 caliber machine guns were also on board, their origin not known.

On or about October 16, 1958, petitioner Rothman delivered to Louis C. Pessolano, who was not indicted but was named as a co-conspirator, in Miami Springs, Florida, $6,000.00 in cash to purchase an airplane (29a). Petitioner Rothman told Pessolano he wanted a plane and pilot for a hunting and fishing expedition up north. The idea to buy the plane was abandoned, and on October 21st, Pessolano delivered in escrow to Samuel Dupont, President of Dupont Air Interests, Miami, Florida, licensee of Hertz-Rent-a-Plane, the $6,000.00 (42b). Pessolano first contacted a pilot by the name of Smith who wouldn't fly the plane because he was out of practice (62b). Smith arranged for Sutor to fly the rented plane (63b). On October 23, 1958, Sutor signed the rental agreement for the twin beech plane (64b). Pessolano talked to Sutor about ten days later when Sutor telephoned for medication for his children and told Pessolano he thought he had hauled guns and he went to a Pittsburgh airport (37a, 38a). Pessolano asked Rothman if they were guns and he amusingly answered, "Yes, guns" (38a). Pessolano denied on cross-examination that he had conspired or entered into any agreement with any of the petitioners or anyone else to ship illegal or stolen guns (40a-42a). Pessolano received $480.00 as commission for obtaining a rental agreement for Dupont Air Interests (46b). On October 24, 1958 the plane was flown from Miami, Florida to Allegheny Airport, (51b-69b). There was evidence that a person who looked similar to Merola, made this trip as a passenger (48a). On the trip north to sell the airplane (54b) and while at the Allegheny County Airport at Pittsburgh, Sutor stated he was taking the plane to New York to sell it (87b). On October 26 the plane landed at the Remich Airport which is located about 20 miles north of Allegheny County Airport. Petitioners

Carlucci, Hanna, Sutor and Merola were identified as being at the Remich Airport on this date as was an automobile registered in Carlucci's name and a panel truck with S & S Distributors on the side. There was no evidence as to what the cargo of the plane was when it left Remich Airfield on October 26 except it was covered with brown material (115b).

On November 3, 1958, the plane's route with stops from Miami, Florida to the Allegheny County Airport was detailed, where it landed and was left over night; the pilot taxied to the Penn-Sheraton Hotel where he was assigned Room 1088. On November 4 the plane flew to Remich Airport where it was loaded (T. 641). It was under surveillance by State Police and Border Patrol. When it took off at about 10:40 a.m., it headed in an easterly direction and was later discovered at about noon at Morgantown, West Virginia where it was searched and stolen guns found. Two firearms were also in the plane. Two government witnesses identified Hanna as the driver of the panel truck on November 4 registered in the name of S & S Distributing Company, a cigarette vending firm, from which truck cargo was loaded onto the plane, petitioner Sutor as the pilot, and the presence of an Oldsmobile red convertible registered in the name of petitioner Carlucci (166b). The evidence did not show Hanna was connected with the S & S Distributing Company. There was evidence that Sutor crawled over the cargo in order to get out of the plane (30b).

The Government for the purpose of supporting its theory that this was a plot to run guns to Cuba introduced testimony that on November 4th at the Allegheny County Airport, when he boarded the plane, petitioner Sutor was carrying a life preserver commonly known as a "Mae West" (146b); that early in October, 1958, petitioner Merola conversed on several occasions with one Gomez who was a Cuban pilot now living in Florida (the witness, Gomez, did not testify that the conversation had anything

to do with transporting guns to Cuba (223b, 224b); that petitioner Rothman received a telephone call while in Cuba from Pessolano and several calls were made from Merola's hotel room to Cuba.

The Government introduced evidence of telephone calls from the home phones of Pessolano to the residence phones of Rothman and Carlucci and also records of telephone calls from Merola to the residences or hotels occupied by some of the other petitioners (Rothman, Carlucci and Sutor). The Government's evidence was also that on November 3, 1958 after registering, a telephone call at 8:24 p.m., was placed from the hotel room of pilot Sutor to the residence phone of Carlucci, who occupies a single residence with his father-in-law and mother-in-law (144b) and also a call to Pessolano's home in Miami at 8:15 p.m. (114b). There was also evidence that showed that a call on November 4, 1958 was placed from the Remich Airport to the Carlucci residence at 9:40 a.m. Telephone service listings for Carlucci were shown as New Kensington, Edison 5-7571 and the City Beverage Company at New Kensington, Edison 5-6904. Merola and his family were shown to have resided at the Garden of Allah Motel at Miami, Florida, Union 5-9881 and there was a residence phone for Merola in Florida at Jefferson 2-5517—8. It was also shown that Merola was registered on September 18, 1958 at the Warwick Hotel, New York City, and that Merola's brother-in-law, Andrew Sims, had a service listing of Penhurst 1-7328. Pessolano's service listing was Florida, Tuxedo 8-4392. Service listing to Mrs. Ethel Rothman (billed to Norman Rothman) Miami, Florida, Union 6-4030. It was also shown that Rothman was registered at the St. Moritz Hotel in New York City on October 22, 1958 at which time he occupied Rooms 2423-2424. Telephone number for St. Moritz was Circle 7-2700.

Telephone service was listed to Sutor as Miami, Florida Tuxedo 7-9076 and calls from the Penn-Sheraton Hotel at Pittsburgh, Pennsylvania listed as Atlantic 1-7100 from Room 1088 registered in his name. Also calls from the

Auld Hofel, Washington, Pennsylvania, Baldwin 2-9856, from Sutor's room. Also the Government's proof was that Pessolano knew Giordano, Hanna and Carlucci for a number of years (25a), Dr. Pessolano having practiced medicine in the home town of these three petitioners. The Government also introduced evidence that Pessolano knew Rothman and Merola; that Merola knew Rothman (244b). There was evidence that Giordano and Carlucci (97a) were acquainted and that Giordano knew the petitioner Hanna (98a). There was also evidence that Carlucci knew Merola (T. 1119).

Petitioner Joseph Giordano took the witness stand and testified in his behalf as follows: that he was 45 years of age, married and had one child, a daughter who attended business college, and his occupation was that of a salesman; that he knew Carlucci and Hanna (97a, 98a) who lived in the same town; he also knew Dr. Pessolano during the years that he practiced in his home town; that during the time he was managing the Bachelors' Club, he purchased beer for the club (T. 1232) from the City Beverage Company which was owned by Carlucci. He further testified that some time in October or November of 1958, he purchased approximately 125 burlap bags for the purpose of covering his lawn after seeding; that he had asked Louis Palumbo to purchase 100 burlap bags for him and that Palumbo made two trips for this purpose (99a); that he had purchased 25 or 30 bags on other occasions (T. 1227); that Louis Palumbo had put the sacks in Giordano's automobile; that he had not seen or talked to Carlucci on the day he asked Palumbo the favor of buying the 100 sacks for him. That when F. B. I. agents Rucker and Douce came to his house, he showed them the 100 burlap bags which were stored in his cellar. He testified that he did not know Rothman, Sutor or Merola (99a). He denied conspiring with the others to commit the offenses charged in the indictment, and he further denied that the sacks that he purchased were used to wrap the guns but said they were used for the purpose

for which he purchased them, i.e., to cover the lawn after seeding (100a-102a).

After hearing reargument en banc, the Court of Appeals affirmed as to all petitioners by a four to three vote. Circuit Judge Hastie dissented in an Opinion concurred in by Chief Judge Biggs and Circuit Judge Kalodner (Appendix "B" below). These three judges would have given all the petitioners a new trial, except that they would have acquitted Giordano.

REASONS FOR GRANTING THE WRIT.

1. The Courts Below Failed to Apply Marshall v. United States, 360 U. S. 310, 79 S. Ct. 1171.

In *Marshall v. United States, supra*, this Court exercised its supervisory power by ordering a new trial where jurors had been exposed to news accounts containing information of a character which the trial judge had ruled was so prejudicial it could not be directly offered as evidence.

In petitioners' case, the Court of Appeals for the Third Circuit has divided four to three in denying petitioners' contention that if the *Marshall* decision is properly applied, their convictions cannot stand.

Granting certiorari in the present case will give this Court opportunity to uphold the correctness of the following application of the *Marshall* case as quoted from the dissenting Opinion in petitioners' case, written by Circuit Judge Hastie and concurred in by Chief Judge Biggs and Circuit Judge Kalodner (Appendix "B" below):

> "Quite apart from questions as to the sufficiency of the evidence concerning the participation of particular individuals in the crimes charged, the appellants contend that the district court erred in its disposition of their request that a mistrial be declared because of

the jury's exposure to information highly prejudicial to the appellants, which was published in daily newspapers in Pittsburgh, Pennsylvania, while this trial was in progress there.

The case was tried to a jury for more than three weeks. During this period the jury was not sequestered. Its members were entirely at large from the end of each trial day until the beginning of the next. During the first week of the trial derogatory articles about the defendants appeared, conspicuously placed and headlined, in local daily newspapers. The articles contained a substantial amount of material prejudicial to the defendants which was not and, in large part, could not have been put in evidence at the trial. As to this there is no dispute. The newspaper stories stated that all of the defendants were connected with a 'gambling combine' in New Kensington, that one of them also operated a gambling concession in Havana, and that the purpose of their attempted exportation of guns was to protect gambling franchises in Cuba.

On June 21st, a few days after these derogatory articles were published, counsel brought the publications to the attention of the trial judge who thereupon questioned the assembled jurors about the matter in open court. The judge first asked the jury whether any of them had read newspaper accounts of the trial. Juror No. 8 replied, 'I have'. The court then asked: 'Are you the only one that has?' At this point jurors Nos. 2, 3, 5, 6, 9, 10, 11, 12 and two alternates all raised their hands, signifying that they too had read newspaper accounts of the trial. This, of course, was in violation of the instructions the court had given the jury. Then one of the jurors addressed the court as follows: 'I would like to qualify my answer, that in reading the newspaper I have noticed the headlines, just noticed them and then just simply paid no further

attention, other than those things you just scan quickly as you look at it. I didn't look at it to remember it'. Thereupon each of the jurors who had admitted reading newspaper articles modified his admission to conform with what had just been said. One of them observed: 'I can say about the same thing. I paid little attention to the accounts in the headlines, knowing it don't mean nothing to me, what is in the paper. I use my own judgment.' Two jurors then said: 'I am the same.' Four others stated 'I have been doing the same.'

The judge then emphasized to the jury the importance of deciding solely on the basis of the testimony in court. He also stressed the gross impropriety of newspaper, radio and television reports containing derogatory information about the defendants on trial. Having thus sought to minimize the risk of prejudice to the defendants the court denied the defendants' motion for a mistrial.

It is indisputable that when jurors are allowed to disperse from day to day during a long much publicized trial there is danger that they will be subjected to improper influences. When derogatory materials about the defendants are published in daily newspapers in communities where the jurors live the likelihood of prejudice to the defendants often becomes so great that corrective action is required. *Griffin v. United States*, 3d Cir. 1924, 295 Fed. 437. The problem is to decide when and whether a situation has developed in which a court should not risk any corrective less drastic than a new trial.

Marshall v. United States, 1959, 360 U. S. 310, is a significant new development of the law in this area. In that case, during a criminal trial some jurors had 'read' and others had 'scanned' articles prejudicial to the defendants. But, examined separately and apart from their fellow jurors, each of them assured the court

that he had not been influenced by the articles in question and could put them out of mind in reaching a decision on the evidence. Before the *Marshall* decision various courts had held that this sort of assurance combined with impressive judicial admonition was enough to make unassailable a decision of the trial judge that the defendants had suffered no serious prejudice from adverse newspaper stories and that there was no sufficient reason for declaring a mistrial. *E.g., United States v. Leviton*, 2d Cir. 1951, 193 F. 2d 848; *United States v. Carruthers*, 7th Cir. 1945, 152 F. 2d 512. But in the *Marshall* case the Supreme Court ignoring this older line, said that this kind of 'exposure of jurors to information of a character . . . so prejudicial that it could not be directly offered as evidence' was in itself enough to require a new trial. 360 U. S. at 312. And see the foreshadowing concurrence of Mr. Justice Jackson and Mr. Justice Frankfurter in a somewhat similar, though clearer, situation in *Sheperd v. Florida*, 1951, 341 U. S. 50.

In the present case, if the jurors had adhered to their first admissions of reading newspaper accounts of the trial, the *Marshall* rule would unquestionably have required that a new trial be ordered. If this case is significantly different from *Marshall*, the difference must be found in the fact that the jurors so modified their original admissions as to indicate only a minimal contact with or observation of articles published about the trial. Two circumstances deserve special mention in this connection. The judge at no time examined individual jurors out of the presence of their colleagues. Each was in position to be influenced by what his colleagues had said about paying little attention to the articles. Second, even in the general questioning of the entire jury there was no inquiry, must less a searching cross-examination, to obtain any explanation of the

jurors' uniform modification of original admissions in order to adopt what a colleague had been heard to say about merely reading 'headlines' and 'those things you just scan quickly as you look at it'. On its face this conduct gives the impression of an effort to escape or minimize possible criticism of their reading about the trial rather than a genuine recollection that admissions made only minutes earlier were mistaken. In these circumstances I think that the change of position by the jurors does not to any really significant extent diminish the great likelihood of prejudice disclosed when on first inquiry so many of them admitted that, contrary to the court's earlier admonition, they had read newspaper accounts of the trial. And because I read the *Marshall* case as meaning that very substantial risk of prejudice in all the circumstances, rather than clear affirmative demonstration of prejudice in fact, is enough to require a mistrial when jurors have been exposed to inadmissible and derogatory publications about a person on trial, I think the *Marshall* rule strongly supports the appellants' demand for a new trial here.

Finally, even in the absence of direct evidence that jurors have read the publications in question, early decisions in this circuit have taken the position that there is a strong logical inference that jurors permitted to separate during a trial have seen or learned of derogatory material about the defendants which has appeared conspicuously during the trial on the front page of a local daily paper. In *Meyer v. Cadwalader*, C.C. E. D. Pa. 1891, 49 Fed. 32, 36, Circuit Judge Acheson said:

> 'It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the

community, they did not see and read these newspaper publications.'

In *Griffin v. United States*, 3d Cir. 1924, 295 Fed. 427, the only evidence that a single derogatory front page newspaper story about the defendant had come to the attention of the jury was testimony that one juror had been seen with a copy of that paper in his possession. The court held that a new trial should have been granted.

These uncompromising rulings of our predecessors in this circuit are old. The Supreme Court ruling in the *Marshall* case is very new. In sum they provide what to me are convincing reasons for directing a new trial in the circumstances of the present case."

We urge the validity of the above views as our first and best reason for the granting of the writ in the present case.

2. Use of the Conspiracy Charge to Convict Persons Who Had No Guilty Knowledge.

In *Krulewitch v. United States*, 336 U. S. 440, 446, 447, 69 S. Ct. 716, Mr. Justice Jackson warned with regard to conspiracy that "loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

The present case bears out Mr. Justice Jackson strikingly. Giordano, a man who supplied burlap bags to others, has been convicted of conspiracy with them and of a substantive offense requiring guilty knowledge. These convictions of a mere supplier of the burlap bags have resulted only from the fact that the bags eventually were used to cover a shipment of stolen firearms, plus the fact that the supplier had previously been acquainted with some of his alleged co-conspirators.

Another petitioner, Hanna, has been similarly convicted merely upon evidence that he was the driver of a truck

which was used in broad daylight to haul cargo to an airport. The cargo turned out to be stolen firearms. There is nothing to show that Hanna had opportunity to know what it was.

Giordano.

As to Giordano, the petitioner who supplied the burlap bags, there is no suggestion in the evidence that he was present at any time when the stolen guns were being handled, or when the airplane or truck in which the guns were carried were being used, or that he even engaged in or attended conversations with regard to the guns, the airplane, the truck, or any of the other paraphernalia of the alleged conspiracy.

Instead, the entire case against Giordano consisted of the following, as well stated in the dissenting Opinion below (Appendix "B"):

> "I think the defendant Giordano should have been acquitted and that this court should now require his acquittal. He was convicted on counts five and seven of the indictment. In my view there was insufficient evidence to prove beyond reasonable doubt his guilt on either count. Count five is a substantive charge of unlawful failure to register certain firearms with the Secretary of the Treasury. I find no evidence whatever that Giordano had any such connection with the possession or transportation of the firearms here in question as to make it his duty to register them. Indeed, the opinion of this court does not discuss this count but rather supports Giordano's conviction of conspiracy under count seven.
>
> The entire proof thought to support the conspiracy charge against Giordano consists of evidence that he purchased some burlap bags; that a friend who worked for Carlucci made the purchase for him; that later these bags, no longer in the possession of Giordano, were used as wrappings for a shipment of contraband

firearms; and that his explanation of the purchase to an investigator shortly after the event differed in some particulars from the account he gave later on the witness stand. It was not proved that Giordano ever knew or intended that the bags were to be used to wrap guns. Beyond that, the prosecution did not even attempt to show that he knew the guns were stolen, unregistered or untaxed, or that there was to be an interstate or foreign shipment of contraband. Yet, only if he was aware of the gun-running scheme and some illegal aspect of it, could he be properly convicted as a member of the conspiracy to commit particular offenses as charged. For, as Judge Learned Hand has reminded us: 'While one may . . . be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes there is a light to run past.' *United States v. Crimmins*, 2d Cir. 1941, 123 F. 2d 271, 273. I think Giordano has been convicted of conspiring to commit various substantive crimes with no evidence whatever of his awareness that these crimes were contemplated, much less, that his activity in connection with a quantity of burlap bags would facilitate these crimes.

The worst that can properly be found in this regard is that Giordano's conflicting statements about the bags show apprehension or even belief that the bags had become involved in some wrongdoing. But that is far short of demonstrating that he acquired or disposed of them intending that they be used in any of the crimes charged in this indictment. In my view this conviction must have been based upon speculation by the jury about the connection of Giordano with the conspiracy charged. Therefore, it should not stand."

However, the Opinion of the Court of Appeals affirms the conviction of Giordano after stating (Appendix "A"):

"Close examination of the evidence concerning Giordano's participation in the conspiracy, leaves no doubt that it was sufficient to take that question to the jury and to justify that body in concluding that the bags admittedly purchased by Giordano were the ones wrapped around the illegal shipment of guns. Such a finding connects Giordano with the conspiracy and makes him a party thereto. Cf. United States v. Cohen, 197 F. 2d 26, 29 (3 Cir. 1952)."

We agree that there is sufficient evidence that the bags admittedly purchased by Giordano later were wrapped around the illegal shipment of guns. But it is an unfortunate and unwarranted extension of the conspiracy doctrine to say, as the majority of the Court below has said, that such a finding criminally connects Giordano with the conspiracy.

There is no suggestion that Giordano did anything more than supply the bags or had any knowledge of what any other person did or agreed to do. There is not any indication that he had a stake in the venture within the meaning of *United States v. Falcone*, 311 U. S. 205, 61 S. Ct. 204. He is entitled to the protection of the *Falcone* rule and the rule that one does not become a party to a conspiracy by aiding and abetting it unless one knows of the conspiracy. *Direct Sales Company v. United States*, 319 U. S. 703, 709, 63 S. Ct. 1265.

Giordano was also indicted in the fifth count of indictment No. 15750 for the substantive offense of shipping, carrying, and delivering the machine guns in commerce without registering them, etc. But there is no evidence he did any of those things, or that he aided and abetted. As Circuit Judge Learned Hand said in *United States v. Peoni*, 100 F. 2d 401, 402 (2d Cir.):

"In order to aid and abet another to commit a crime, it is necessary that a defendant in some sort associate himself with the venture, that he participate in

it as in something that he wishes to bring about that he seeks by his action to make it succeed."

The Court below also points out in its Opinion (Appendix "A"):

> "The jury had before it, the long term association between Giordano and the defendants Carlucci and Hanna; that when Giordano purchased the bags he was at Carlucci's place of business, that he spoke with Carlucci at that time, and that he sent one of Carlucci's employees to purchase the bags for him. This collocation of circumstances provides an adequate basis upon which the jury could logically conclude that Giordano did have knowledge of the conspiracy and was an integral part of it. United States v. Guiliano, supra; United States v. Monticello, 264 F. 2d 47 (3 Cir. 1959)."

But this simply means that when the alleged conspirators obtained burlap bags in order to cover the firearms with them, they got those bags through someone they knew, Giordano. Obviously this does not make him a conspirator and the jury should not have been allowed to say that it did.

The Court of Appeals decision in the present case is in conflict with the settled law of conspiracy and conflicts particularly with the following circuit cases: *U. S. v. Bufalino*, 285 F. 2d 408 (2d Cir.); *Jones et al. v. U. S.*, 251 F. 2d 288 (10th Cir.); *Stanley v. U. S.*, 245 F. 2d 426 (6th Cir.); *U. S. v. Aviles*, 274 F. 2d 179 (2d Cir.); *U. S. v. Langer*, 76 F. 2d 817 (8th Cir.). The Third Circuit's present decision is in direct conflict with the decision of this Court in *Ingram v. U. S.*, 360 U. S. 672, 79 S. Ct. 1314.

Hanna.

The airplane on which the guns were found on November 4, 1958, after it had been flown north from Florida, had made another trip north on October 24 of the same year. During the first trip, petitioner Hanna had been present at

an airport near Pittsburgh when the plane landed there. He had not done anything except engage in conversation with unidentified persons who were also at the airport.

However, on November 4, 1958, Hanna was the chauffeur of a panel truck belonging to a cigarette vending company, in the rear of which the firearms were brought to the same airport near Pittsburgh where other persons loaded them on the plane.

At this point we have stated all the evidence against Hanna. On this evidence he has been sentenced to five years in prison for conspiracy and for substantive offenses requiring guilty knowledge.

Yet there is not evidence to warrant the inference that Hanna was anything more than the innocent chauffeur of somebody else's truck which contained stolen cargo that Hanna may have known nothing about.

In its Opinion, the Court of Appeals makes much of the assertion that Hanna had previously associated with three of the other alleged conspirators. There is no such evidence, but if there was it would merely suggest that, if they hired him to drive the truck, they selected as chauffeur a person whom they knew. This does not warrant imputing guilty knowledge to that person.

Nor can guilt on Hanna's part be presumed or inferred on the theory that he was in possession of recently stolen goods. Before even that familiar and much abused "presumption" can arise, it must be affirmatively shown that the possessor knew what it was that he possessed. *Ex parte LaPage*, 216 Fed. 256, 259 (N. D. N. Y.).

If the conviction of Hanna is allowed to stand, it will mean that juries can pass on criminal charges against truck drivers merely upon proof that their cargo included stolen goods. If the conviction of Giordano is allowed to stand, it will not even be safe to sell people burlap bags, particularly if the seller had previously known the purchaser. To prevent such unwarranted extension of the already much abused conspiracy doctrine, we ask for certiorari in this case.

Carlucci.

The guns were found in the airplane in Morgantown, West Virginia on November 4, 1958. The airplane in which they were found had been at a private air field near Pittsburgh earlier on that day. There is no evidence as to Carlucci's whereabouts on that day. There was evidence that on that morning someone had telephoned the house where Carlucci resided with his father-in-law in New Kensington, Pennsylvania.

It appears that the airplane had been at the same private airport near Pittsburgh on an earlier occasion, October 26, 1958, and that on that occasion Carlucci was at the airport as were Hanna, Merola, and the pilot of the airplane, Sutor, and others. On that occasion Carlucci showed the plane where to park, stepped into it, and then alighted and drove off with Sutor. But there is not the slightest evidence that this had anything to do with guns or a criminal conspiracy of any sort whatever. There is no suggestion that the airplane was used for transporting guns on October 26. The only other evidence with regard to Carlucci, if one can call it that, consisted of records of telephone calls from the abodes of some of the other alleged conspirators to the residence of Carlucci and Carlucci's father-in-law. There is no evidence of who made the calls. There was no suggestion of what they talked about, or of what prompted the calls.

As we stated above, it was an employee of the company owned by Carlucci who purchased some burlap sacks for Giordano. There is no suggestion that Carlucci was aware of this or suggested it.

On the above evidence, Carlucci has been sentenced to five years in prison for conspiracy. Manifestly, the evidence does not show any criminal involvement on his part.

On indictment No. 15750 Carlucci was also indicted in the first five counts for various substantive offenses connected with the transportation, receipt, concealment, and possession of the guns, and in the sixth count for engaging

in the business of exporting them. There is zero evidence he did any of such things or that anyone exported anything, let alone engaged in the business of doing so. Nor did Carlucci aid *or* abet the transporting, receiving, concealment or possession. Whatever he did, there is no evidence he knew the guns were stolen or that they were to be carried interstate or even that they existed. Such knowledge is an essential element of guilt as an aider and abetter. *United States v. Gordon*, 253 F. 2d 177 (7th Cir.); *Pearson, et al. v. United States*, 192 F. 2d 681 (6th Cir.); *United States v. Tarnipseed*, 272 F. 2d 106 (7th Cir.)

What we have here then is mere suspicion and conjecture as to this matter, and we submit that in our Federal Courts, persons charged with crime cannot be convicted on suspicion, and it is not a question whether a conjecture as to guilt could be spelled out on the record but whether guilt could be found by the jury according to the principles of law and evidence which have application and the practices and standards appropriate to criminal trials. Applying this test as to the evidence submitted to prove this count the Court should have granted petitioner's motion for judgment of acquittal.

Merola.

There is no evidence as to Merola's whereabouts on the day the guns were found (November 4, 1958). But it does appear that he was at the airport on October 26, 1958 as were Carlucci, Hanna and Sutor. But Merola didn't do anything. He was just there. In passing, we point out with regard to Merola, as we might have with regard to Carlucci, that he was present at the airport on October 26, 1958, a day on which no evidence suggests guns were transported, but he was not present at the airport on the pivotal day of November 4, 1958. It almost appears that he was involved with the airplane on day when it was innocently employed and not on other days. There was plenty of evidence that Merola knew some of the other alleged con-

spirators, but none that he conspired with them. Here as elsewhere, we are minded to recall the language of Circuit Judge Hamley in *Evans v. United States*, 257 F. 2d 121, 126 (9th Cir.) when he said:

> "(5, 6) It is no doubt true that the evidence as to William's association with Josephine, and as to his own past record of convictions, give rise to a suspicion that he conspired with Josephine regarding the transaction of March 4, 1957. But a suspicion, however strong, is not proof, and will not serve in lieu of proof. *One Way Jong v. United States*, supra, 245 F. 2d 394."

The prosecution will undoubtedly point out that on several occasions Merola was seen talking to a resident of Florida who formerly had been a pilot and had lived in Cuba, and that a telephone listed in Rothman's name in Cuba had received several calls from Merola's hotel room. But there is no suggestion as to what prompted these telephone calls or what was talked about. Merola's telephone was also used by someone to call the homes of some of the other petitioners, but again no one knows why. But neither Dr. Pessolano nor anyone else suggested that Merola knew for what the plane was obtained or that he was not entirely indifferent to the subject. Here again, the prosecution runs up against a stone wall in the form of the rule that one does not become a party to a conspiracy by aiding and abetting it unless one knows of the conspiracy. Furthermore, it is necessary that the knowledge be of the particular offense to which the conspiracy is dedicated. *Ingram v. United States*, 360 U. S. 672, 79 S. Ct. 1314.

Sutor.

At first blush, there might appear to be some doubt about Sutor's right to judgment of acquittal, for he was the pilot of the plane on November 4, 1958 and, after an earlier trip in the plane, he had remarked to Dr. Pessolano that he "thought" the nature of the cargo on that earlier

trip had been guns (37a, 38a). At the airport at Pittsburgh, on the morning of November 4, 1958, Sator was carrying a life preserver when he boarded the plane.

On a closer analysis, it is seen once again that the case is one of mere suspicion. For example, there is nothing to show that he "knew" that the earlier cargo had been guns. He merely "thought" it. And if the cargo was guns, there is nothing to show that it may not have been a perfectly legal shipment of guns which would have resulted in lulling Sator into a false sense of confidence and trust and would in no way be inconsistent with his innocence of criminal conspiracy.

Perhaps it will be helpful to analyze the case against Sator from the viewpoint of every charge against him.

In the Pennsylvania indictment (No. 15750) he was charged only in the seventh count. The charge was that of conspiring with the other defendants and Pessolano, and some divers other persons to commit the following offenses against the United States (16a, 17a).

1. To transport in interstate and foreign commerce some rifles, carbines and machine guns which had theretofore been the property of the United States government which had been stolen from a National Guard Armory in Canton, Ohio, knowing the same to have been stolen. But there is nothing to show expressly or impliedly that he knew he was going to do any such thing when he agreed to fly the plane or at any time before the moment when his possession of the recently stolen goods perhaps took place near Pittsburgh on November 4, 1958. There is no proof of guilty knowledge, just suspicion. He may have "thought" that since his earlier trip had been for guns, so was the November 4, 1958 trip for guns. But there is nothing to suggest that he thought, let alone knew or agreed, that it was to transport stolen guns. The presumption of knowledge that they were stolen can only be based upon the possession. To add a further presumption

that presumptive knowledge at the time of conspiracy follows from presumptive knowledge at the time of the possession is to add presumption to presumption and that has never been permitted.

The next subsection of the seventh count of the Pennsylvania indictment is the same as the first subsection except it charges reasonable cause to believe that the guns had been stolen instead of actual knowledge. Whatever the "unreasonable cause" was that the prosecution had in mind when they drafted the indictment, they never produced evidence of any cause that would have lead Sutor to believe that any of the guns had been stolen. To this we would also add all the arguments we made in connection with the first subsection of the seventh count as to Sutor.

The third subsection of the count charges conspiracy to receive and conceal the guns knowing them to have been stolen and to have been the property of the United States government. Of course, there is no evidence that he ever agreed to conceal anything. Perhaps the jury could find that he agreed to receive guns, but only by a process of basing a verdict on suspicion could the jury find that Sutor conspired to receive guns knowing them to have been stolen from the United States government. There is nothing to show that he had any idea the government had had anything stolen from it. As Circuit Judge Learned Hand once observed, you can be guilty of going through a traffic light of whose existence you were ignorant, but you cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one suspects that there is a light to run past. *United States v. Crimmins*, 123 F. 2d 271, 273 (2d Cir.).

The fourth subsection of the count charges conspiracy to commit the offense against the United States of possessing six machine guns which had been transferred in the United States without tax thereon having been paid. Here we make the same contention as with regard to the preced-

ing subsections and also point out the complete lack of evidence of any transfer.

The fifth subsection of the count charges conspiracy to ship, carry and deliver in interstate commerce from Pennsylvania to Morgantown, West Virginia, the machine guns without having registered them with the Secretary of the Treasury, and without having the proper stamp affixed, etc. Here again, there is nothing to show that Sutor had knowledge of any such dereliction. He was just a chauffeur for airplanes.

The sixth and final subsection of the seventh count of the Pennsylvania indictment charges conspiracy to engage in the business of exporting arms. There is nothing to show anybody ever did this, or that any arms were ever exported or to be exported. Nor was there any evidence that Sutor agreed to go into any particular business except that of chauffering an airplane between Florida and the northern part of the continental limits of the United States.

The prosecution can be expected to argue that Sutor had guilty knowledge because he once designated the owner of the airplane as his employer instead of Pessolano, and because he stated at various times that he was supposed to sell the plane. There is nothing to suggest that he was not supposed to. In any event, if his alleged statements were inaccurate, they would not show knowledge of the matters alleged in the counts of the indictment. This is not like a case where upon being confronted by an accusation of a particular crime, a man tells specific lies about his name or his whereabouts at a specific time. General inaccuracy never shows guilty knowledge of particular crimes.

Sutor is the only defendant against whom there is a second indictment. It had been returned in the Northern District of West Virginia, and had been consolidated for trial with the first indictment in Pittsburgh.

The first count of the West Virginia indictment (21a) is similar to the second subsection of the seventh count of the Pennsylvania indictment and is answered above.

The second count of the West Virginia indictment is the same as the first subsection of the seventh count of the Pennsylvania indictment and is also answered above. As to this count and the first count it is also important to note that there can be no presumption or inference against Sutor from "unexplained" possession of stolen goods. The prosecution itself supplied the explanation. Sutor was the pilot of a chartered plane and this was his cargo. According to the prosecution's theory, it was delivered to him openly, by day, from an ordinary panel truck.

The third, fourth, fifth, sixth, seventh and eighth counts of the West Virginia indictment charge possession of the various firearms and that they had been transferred without the transfer tax having been paid. But the statute defines transfer as including "sell, assign, pledge, lease, loan, give away, or otherwise dispose of."[1]

There was no evidence that anyone sold, assigned, pledged, leased, loaned or gave away any of the guns in this case, or that anyone disposed of them. There was evidence they were stolen and that the government was the victim. But that does not mean that the government disposed of them.

The two fifty-caliber machine guns were not charged to have been stolen from the government. There is no evidence of where they came from or how or that they were ever transferred.

The ninth court of the West Virginia indictment charges Sutor unlawfully carried all the machine guns without a stamp-affixed order evidencing the transfer. But as we have pointed out, there was no evidence of a transfer.

Rothman.

There is no evidence that Rothman conspired with "divers other persons" as charged in the indictment. And,

1. 26 U. S. C. A. § 5848, Paragraph 10.

as we have attempted to demonstrate above, there is no evidence that any of the named indicted co-conspirators conspired with Rothman. Accordingly, if Rothman, who was not named in any substantive counts, is to go to jail, it must be upon the theory that he conspired with Dr. Pessolano, the unindicted co-conspirator.

But the only evidence shows that while Rothman had been in Cuba he had received a telephone call from Pessolano, and that telephone calls had been made from Pessolano's home telephone to the telephone at Rothman's residence, and that Rothman had handed Pessolano the money to rent the airplane and had said that it was going to be used for hunting and fishing (45a). He also said Yes when Pessolano asked him if the cargo was guns. This is not inconsistent with the theory Rothman thought they were legitimate guns. In any event, Pessolano thought Rothman was joking[2] (58a) and therefore guilty knowledge cannot be attributed to Pessolano. Accordingly, Pessolano is no co-conspirator.

It may be that the government is not bound by Pessolano's testimony disclaiming guilty knowledge, but if it is not bound that does not fill the vacuum caused by the complete absence of proof that Pessolano had such knowledge.

Furthermore, the whole theory as to Pessolano being a co-conspirator is only that, like *Falcone* in *United States v. Falcone*, *supra*, he supplied an airplane (instead of sugar) to the other conspirators with knowledge they were going to run the guns. We think we have demonstrated there is no evidence of such knowledge. But even if he had such knowledge, he had no stake in the conspiracy and would be not guilty under the *Falcone* doctrine.

Perhaps the government could properly have convicted Rothman if they had charged him with something like will-

2. At 46a, Pessolano testified that he had not put too much weight in Rothman's answer about the guns.

fully causing stolen guns to be transported in interstate commerce, or some version of concealing or procuring or aiding or abetting such transportation. But they did not indict him for any of those things. Just for conspiracy.

CONCLUSION.

For the reasons set forth herein we respectfully submit that this Petition for Writ of Certiorari should be granted.

V. J. RICH,
VINCENT M. CASEY,
MICHAEL VON MOSCHZISKER,
Attorneys for Petitioners.

CERTIFICATE OF SERVICE.

I certify that I have served five copies of the foregoing Petition upon Solicitor General of the United States Department of Justice, Washington 5, D. C., by placing them in the United States mail addressed to him.

MICHAEL VON MOSCHZISKER,
An Attorney for Petitioners.

APPENDIX "A".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,136, 13,137, 13,138, 13,139, 13,140, 13,141, 13,162

UNITED STATES OF AMERICA,
Appellee

v.

VICTOR CARLUCCI, JOSEPH GIORDANO, DANIEL HANNA, JOSEPH MEROLA, NORMAN ROTHMAN, STUART SUTOR,
Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued March 24, 1960

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

Reargued November 17, 1960

Before BIGGS, *Chief Judge* and GOODRICH, McLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed March 2, 1961)

By McLAUGHLIN, *Circuit Judge.*

These appeals have been taken by six defendants who were tried and convicted together in the District Court for the Western District of Pennsylvania for substantive crimes and a conspiracy involving the alleged receiving, possession, transportation and exportation of a quantity of firearms stolen from the Government of the United

States. All of the appellants urge that the evidence presented by the Government failed to prove beyond a reasonable doubt that they were guilty of the conspiracy or of the substantive crimes. Our review of the evidence as to the appellants Carlucci, Merola, Rothman and Sutor convinces us that there was, at the very least, substantial evidence to support the jury verdict. Regarding appellants Giordano and Hanna, a detailed account of their connection with the conspiracy is necessary. We note at the outset, the fundamental proposition that in so doing, "The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." United States v. Guiliano, 263 F. 2d 582, 584 (3 Cir. 1959).

When the illegal shipment of the guns was seized by the federal agents, the guns were wrapped in used burlap bags that were turned inside out. To connect these burlap bags with Giordano and thereby tie him into the conspiracy, the government offered the following affirmative proof: that sometime prior to the seizure of the guns, Palumbo, an employee of another of the defendants, Carlucci, had purchased 100 used bags turned inside out for the appellant Giordano from the Arnold Cash Feed Store; that the Arnold Cash Feed Store only sold used bags in this form; that this was an unusually large purchase; that the bags which were wrapped around the guns were used burlap bags turned inside out; that upon F. B. I. laboratory analysis, the residual content of the bags wrapped around the guns was found to be a scratch feed composed of wheat, oats and cracked corn; that this was the same type of grain found at the Arnold Cash Feed Store, under the seat of the plane, and in the bed of the panel truck used to transport the guns to the plane.

Giordano was the only defendant to testify. He stated that he knew the defendants Carlucci and Hanna for approximately fifteen years. He admitted sending Palumbo to purchase the bags for him, but denied talking to

Carlucci on that day. He said that the bags were to be used as a protection for newly planted grass on his lawns. He testified that Palumbo put the 100 bags in the back of his car which he drove home that evening. When he went to look for the bags the next day, he discovered that his daughter had taken the car with the bags in it to Robert Morris School in Pittsburgh. Upon her return a few days later, he placed them in his cellar and subsequently used some of them on his lawn. He further testified that because of this incident, he had purchased 30 other bags from the store in the interim.

In rebuttal, the government produced the testimony of an F. B. I. agent who had gone to Giordano's home to question him ten days after the seizure of the guns. The agent said that at this interview, Giordano stated that on the day he requested Palumbo to purchase the bags, he had spoken with Carlucci. Giordano also told the agent that his daughter had taken the bags to Seton Hill College in Greensburg and not Robert Morris School as his direct testimony had indicated. Upon inspection of the premises the agent discovered 148 bags: 99 in Giordano's cellar, 40 on the front lawn, 6 under the rear porch, and 3 in the trunk of his car. In addition to the numerical discrepancy between the number of bags Giordano admitted purchasing from the Arnold Cash Feed Store (130 bags), and the number found on his premises (148 bags), a close examination of the 99 bags in his cellar showed that they were *new bags turned right side out*.

Close examination of the evidence concerning Giordano's participation in the conspiracy, leaves no doubt that it was sufficient to take that question to the jury and to justify that body in concluding that the bags admittedly purchased by Giordano were the ones wrapped around the illegal shipment of guns. Such a finding connects Giordano with the conspiracy and makes him a party thereto. Cf. United States v. Cohen, 197 F. 2d 26, 29 (3 Cir. 1952).

In his brief appellant Giordano argues that even if the jury did so find,

> "There is no suggestion that Giordano did anything else or had any knowledge of what anybody else did or agreed to do. There is not any indication that he had a stake in the venture within the meaning of United States v. Falcone, 311 U. S. 205, 61 S. Ct. 204. He is entitled to the protection of the Falcone rule and the rule that one does not become a party to a conspiracy by aiding and abetting it unless one knows of the conspiracy. Direct Sales Company v. United States, 319 U. S. 703, 709. 63 S. Ct. 1265."

In United States v. Guiliano, 263 F. 2d 582, 584-5 (3 Cir. 959), we precisely outlined the scope of the Falcone doctrine as follows:

> "As the Supreme Court said in Direct Sales Co. v. United States, 1943, 319 U. S. 703, 709, 63 S. Ct. 1265, 1268, 87 L. Ed. 1674, the Falcone case stands for the proposition 'that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally.' The gist of the rationale for the case of United States v. Falcone may be found at pages 210-211, of 311 U. S. at page 207 of 61 S. Ct.: 'These having no *knowledge of the conspiracy* are not conspirators, * * * and one who *without more* furnishes supplies to an illicit distiller is not guilty of a conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.' (Emphasis supplied). Cf. Direct Sales Co. v. United States, supra."

As is readily seen the principle is not applicable here. Giordano makes no assertion that he is an innocent dealer

or supplier of goods to the conspirators. Nor does anything appear in the evidence that could support that sort of surmise. Moreover, there was other proof in addition to that identifying the bags wrapped around the guns as those bought by Giordano. The jury had before it, the long term association between Giordano and the defendants Carlucci and Hanna, that when Giordano purchased the bags he was at Carlucci's place of business, that he spoke with Carlucci at that time, and that he sent one of Carlucci's employees to purchase the bags for him. The collocation of circumstances provides an adequate basis upon which the jury could logically conclude that Giordano did have knowledge of the conspiracy and was an integral part of it. United States v. Guiliano, supra; United States v. Monticello, 264 F. 2d 47 (3 Cir. 1959).[1]

Two main arguments are urged on behalf of the appellant Hanna. First, it is contended that even though there was clear evidence identifying Hanna as the driver of the truck whose cargo had been transferred to the plane which was subsequently seized with the illegal shipment of guns, there was no proof that the truck's cargo was the illegal shipment of guns. Factually, appellant's position is that the guns could have been placed on the plane at some other place between Remick Field, near Pittsburgh, Pennsylvania, and the Morgantown Airport, in West Virginia. The government proof discounts this theory. It shows

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1. The fact that this evidence is circumstantial, does not prevent the affirmance of the jury verdict. United States v. Georga, 210 F. 2d 45 (3 Cir. 1954); United States v. Mighorino, 238 F. 2d 7, 9 (3 Cir. 1956); United States v. Amedeo, 277 F. 2d 375, 377 (3 Cir. 1960). As aptly stated in United States v. Georga, supra, at p. 48:

> "To establish conspiracy this court has said many times that it is not necessary to show any formal agreement among the conspirators. Judge Leahy found the picturesque language to express the point when he quoted: 'The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.' William Goldman Theatres, Inc. v. Loew's, Inc., 3 Cir. 1945, 150 F. 2d 738, 743 note 15."

that the plane took off empty from the Allegheny County Airport, Pittsburgh, about 9:00 A. M. on the particular day. It arrived at Romick Field at 9:30 A. M. A telephone call was then placed from the field to Carlucci's home, and approximately 15 minutes later, Hanna arrived with the truck. The cargo from the truck was transferred to the plane, the process taking approximately one hour. The plane left at 11:00 A. M. and landed an hour later at the Morgantown Airport where it was seized. The distance between Romick Field and the Morgantown Airport was 67 miles. The weight of the seized cargo of guns was 1200 pounds.

These events and their chronology, while not spelling it out completely, did furnish enough justification for the jury's deduction that the items transferred to the plane from the truck driven by Hanna were the guns subsequently seized.

Next, appellant asserts:

> "* * * even if guns were being loaded into the plane on November 4 to the knowledge of Hanna there is no evidence to show that he was anything more than a chauffeur * * *."

In essence, this is the same theory urged on behalf of Giordano, i.e., lack of knowledge of the conspiracy. Again it is defeated by the trial evidence and legitimate inferences therefrom. That evidence pointed to Hanna as the driver of the truck. More important with relation to Hanna's assertion of lack of knowledge is the testimony that when the plane arrived at Romick Field a call was made from the airport to Carlucci's home and a short time thereafter, Hanna arrived driving the truck loaded with the illegal shipment of guns. Coupled with this is the story of prior association between Hanna and three other conspirators, Carlucci, Merola and Sutor. Specifically, that one week before, a similar flight was made from the same airport under the same circumstances. That plane's

cargo or destination was not established but Hanna, Carlucci, Sutor and Merola were positively identified as being there at that time.

Hanna's acts in sum total are contradictory of the defense that he had no knowledge of the conspiracy. As with Giordano we are forced to hold that the trial judge had no recourse but to let the question go to the jury. The latter by its verdict decided that Hanna did have knowledge of the conspiracy and was part of it. The evidence is sufficient to support those implied findings and they must be affirmed. United States v. Guiliano, supra; United States v. Monticello, supra.

The only other important problem in this appeal concerns the alleged exposure of the jury to articles prejudicial to the defendants which appeared in Pittsburgh newspapers during the trial.[2] On defense counsel calling the court's attention to these, the latter immediately inquired whether any of the jury had read them. A number of jurors indicated they had. As they were being checked, one of them said: "I would like to qualify my answer, that in reading the newspaper I have noticed the headlines, just noticed them and then just simply paid no further attention, other than those things you just scan quickly as you look at it. I didn't look at it to remember it." Another stated, "I just glanced at the headlines, I never studied it." Several jurors commented, "I just glanced at it. Just the headline." The court meticulously questioned every remaining juror. These all replied that they had not read the accounts. For a page and a half of the printed record the judge followed this up by patiently and carefully reminding the jury of his long talk to them as members of the venire and prior to their selection to serve in

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2. An article in a New Kensington newspaper was later included. It is clear from the record that there was no proof any juror ever saw that paper. Kensington is some twenty-five miles from Pittsburgh. It was undisputed at the reargument that no one on the jury was from New Kensington.

this case.[3] He repeated his fundamental thesis that a defendant is presumed innocent "* * * unless and until all the evidence and from all the evidence in the case a jury believes to the contrary beyond a reasonable doubt." Finally he said to them:

> "Now I am going to ask this question of all of you: From your glances or perusal of any of the headlines or of any other matter contained in any newspaper or anything you might have heard on a television broadcast or radio broadcast, is there anyone here who has any doubt in his mind or her mind but that he or she could try this case and base his or her verdict entirely upon the evidence brought into court and admitted here and uninfluenced by any outside communication of any kind whatsoever? Now don't be afraid to say so.
>
> "If you have any qualms about it, if there is anything you have heard outside the courtroom concerning any person connected with this trial which you have reason to believe would make it difficult for you to give any of the defendants in this case a fair trial, please don't hesitate to say so."

None of the jurors indicated having heard or seen anything outside the court room regarding any person

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3. He had then explained to them the necessity of being careful about newspaper accounts, radio broadcasts or television pictures regarding the case; how "Neither judge nor jury must have any thought in mind other than that this defendant at this time must be presumed to be innocent and that he cannot be adjudged guilty unless and until the evidence in the case convinces the jury beyond a reasonable doubt." He, at that time, appealed to any panel member who had been so affected by the publicity that he or she could not be a fair juror to tell him. He stressed "* * * the sacred importance * * * of following these simple rules, which are the most important rules we have, that every individual accused of an offense is innocent unless and until the evidence introduced in this case convinces that person, that jury, to the contrary beyond a reasonable doubt."

connected with the trial which had created doubt of his or her ability to try the defendants fairly. The judge expressed himself as satisfied and proceeded with the trial.

The situation before us is not that which confronted the court in United States v. Marshall, 360 U. S. 310 (1959), where members of the jury had read the newspaper articles and the query was as to the effect upon them of exposure to their content. In this appeal none of the jury had read any of the articles and there was no question of possible resultant harm. So the narrow issue for our conideration is not whether the district judge abused his discretion in gauging the consequence upon the jurors of newspaper accounts read by them but whether the judge was wrong in law by believing all twelve jurors when they told him that the most they had done was glance at the headlines. It has been argued that the jurors said this in order to avoid criticism by the court. That is a completely unwarranted assumption. A vigilant, experienced judge was in charge. His every word and every move established his determination to see to it that the trial was conducted with full justice to both sides. The court's early address to the panel, his attitude throughout this long trial which, with some interruptions, extended from January 11, 1960 to February 4, 1960, was one of highest sympathetic consideration for the jury. His above quoted language demonstrates that he was no bullier of citizens striving to do their sworn duty but perhaps caught in a hardly comprehensible problem not intentionally of their making. He courteously urged them to tell him if any one had read the stories and his "Now please don't be afraid to say so!" and "please don't hesitate to say so" were statements honestly made which must be honestly interpreted. Thus interpreted they meant that any such juror would be excused without the slightest unfavorable remark. Even the most biased argument would be hard put to suggest that all twelve jurors, sworn to try the indictments fairly would deliber-

ately break their oaths by remaining in the box, having read the items, instead of bowing out under the wise protection of the court and saving not only their dignity but their honor.

From the whole record we are confident of the jurors' probity. However, for the purposes of this appeal we need not go that far. There was most substantial evidence in support of the court's conclusion that the jurors had not read the news accounts. Suggestion to the contrary is at most suspicion founded on a worm's eye view of jurors generally. The judge was justified in believing the members of the jury. And believing them he had no recourse but to deny the motion for mistrial, the sole excuse for which was the theory that a member or members of the jury had read the trial accounts and therefore had been exposed to improper and prejudicial information respecting the defendants.

No decision has been furnished us or have we found any which is in conflict with our above conclusion. United States v. Marshall, supra, lends no help to the appellants' view. It lays down as its guiding principle where jury prejudice is alleged to exist that "each (case) must turn on its own special facts." Here the objected to accounts never reached the jury. The headlines which are all the jury saw contained nothing relative to the trial that was not in evidence. In Marshall there was admittedly juror exposure to the contents of the articles. According to the Court of Appeals opinion, 258 F. 2d 94, 97 (1958), "Six of the jurors read one of the articles and two of the six had read both." The Supreme Court opinion is founded on the reading by the jurors of news articles concerning the trial. It says page 312:

> "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the *reading by jurors of news articles concerning the trial.* * *

Generalizations beyond that statement are not profitable, because each case must turn on its special facts." (Emphasis supplied.)

We never reach the Marshall doctrine of whether the large discretion of a trial judge was rightly exercised on the issue of prejudice resulting from the reading by jurors of news articles of the trial. The court found that the news articles in this instance had not been read by the jurors. Therefore there was no exposure to their views and no possible prejudice to the jury.

In Griffin v. United States, 295 Fed. 437 (1924), there was, in Marshall, the acceptance of exposure by the jury to prejudice. The opinion itself states at p. 439, "Members of the jury had been seen reading newspapers". Meyer v. Caldwalader, 49 Fed. 32 (3 Cir. 1891), cited in Griffin, significantly makes no statement in the opinion that cautionary instructions were ever given the jury. The opinion does say "The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications." To literally follow the reasoning of the opinion would mean sequestering all juries where there was a possibility of that sort of publicity otherwise mere appearance of an article held to be prejudicial regarding the trial, would be sufficient ground for granting a motion for mistrial. This is not the doctrine of the Supreme Court in Marshall. In McKibben v. Philadelphia and R. Ry. Co., 251 Fed. 377 (3 Cir. 1918) the complained of newspaper was indisputably brought into the jury room by a juror and read to all of the other jury members. Vaughan v. Magee, 218 Fed. 630 (3 Cir. 1914), is merely another example of a jury having been actually exposed to a statement which was not in evidence. The opinion, p. 632, reads: "It suffices to say the jury had before it substantial statements of matters which were not only not in evidence but

which on no principle of law could have been admitted into evidence." United States v. Ogden, 105 Fed. 371 (D. C. E. D. Pa. 1900), another decision urged by appellants, contains positive proof by the jurors that they had read and discussed the offensive report.

We have examined appellants' other points. They are without merit and do not warrant discussion.

The judgment of the district court will be affirmed.

APPENDIX "B".

DISSENTING OPINION—UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HASTIE, *Circuit Judge*, dissenting.

I think the defendant Giordano should have been acquitted and that this court should now require his acquittal. He was convicted on counts five and seven of the indictment. In my view there was insufficient evidence to prove beyond reasonable doubt his guilt on either count. Count five is a substantive charge of unlawful failure to register certain firearms with the Secretary of the Treasury. I find no evidence whatever that Giordano had any such connection with the possession or transportation of the firearms here in question as to make it his duty to register them. Indeed, the opinion of this court does not discuss this count but rather supports Giordano's conviction of conspiracy under count seven.

The entire proof thought to support the conspiracy charge against Giordano consists of evidence that he purchased some burlap bags; that a friend who worked for Carlucci made the purchase for him; that later these bags, no longer in the possession of Giordano, were used as wrappings for a shipment of contraband firearms; and that his explanation of the purchase to an investigator shortly after the event differed in some particulars from the account he gave later on the witness stand. It was not proved that Giordano ever knew or intended that the bags were to be used to wrap guns. Beyond that, the prosecution did not even attempt to show that he knew the guns were stolen, unregistered or untaxed, or that there was to be an interstate or foreign shipment of contraband. Yet, only if he was aware of the gun running scheme and some illegal aspect of it, could he be properly convicted

as a member of the conspiracy to commit particular offenses as charged. For, as Judge Learned Hand has reminded us: "While one may . . . be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes there is a light to run past." *United States v. Crimmins*, 2d Cir. 1941, 123 F. 2d 271, 273. I think Giordano has been convicted of conspiring to commit various substantive crimes with no evidence whatever of his awareness that these crimes were contemplated, much less, that his activity in connection with a quantity of burlap bags would facilitate these crimes.

The worst that can properly be found in this regard is that Giordano's conflicting statements about the bags show apprehension or even belief that the bags had become involved in some wrongdoing. But that is far short of demonstrating that he acquired or disposed of them intending that they be used in any of the crimes charged in this indictment. In my view this conviction must have been based upon speculation by the jury about the connection of Giordano with the conspiracy charged. Therefore, it should not stand.

The case of the defendant Hanna is different. He was the truck driver who transported the stolen goods to the airport. He is charged in several counts. In count three he is charged with the substantive offense of possession of property of the United States knowing it to have been stolen. *Cf. Rayborn v. United States*, 6th Cir. 1956, 234 F. 2d 368. Unquestionably he did for a time have a truck load of stolen guns in his possession. He never offered any exculpatory explanation of this. Accordingly, a jury could properly infer guilty knowledge from his unexplained possession of the stolen articles. *Cf. United States v. Allegrucci*, 3d Cir. 1958, 258 F. 2d 70. For this reason I think Hanna is not entitled to acquittal as a matter of law.

Quite apart from questions as to the sufficiency of the evidence concerning the participation of particular individuals in the crimes charged, the appellants contend that the district court erred in its disposition of their request that a mistrial be declared because of the jury's exposure to information highly prejudicial to the appellants which was published in daily newspapers in Pittsburgh, Pennsylvania while this trial was in progress there.

The case was tried to a jury for more than three weeks. During this period the jury was not sequestered. Its members were entirely at-large from the end of each trial day until the beginning of the next. During the first week of the trial derogatory articles about the defendants appeared, conspicuously placed and headlined, in local daily newspapers. The articles contained a substantial amount of material prejudicial to the defendants which was not and, in large part, could not have been put in evidence at the trial. As to this there is no dispute. The newspaper stories stated that all of the defendants were connected with a "gambling combine" in New Kensington, that one of them also operated a gambling concession in Havana, and that the purpose of their attempted exportation of guns was to protect gambling franchises in Cuba.

On June 21st, a few days after these derogatory articles were published, counsel brought the publications to the attention of the trial judge who thereupon questioned the assembled jurors about the matter in open court. The judge first asked the jury whether any of them had read newspaper accounts of the trial. Juror No. 8 replied, "I have". The court then asked: "Are you the only one that has?" At this point jurors No. 2, 3, 5, 6, 9, 10, 11, 12 and two alternates all raised their hands, signifying that they too had read newspaper accounts of the trial. This, of course, was in violation of the instructions the court had given the jury. Then one of the jurors addressed the court as follows: "I would like to qualify my

answer, that in reading the newspaper I have noticed the headlines, just noticed them and then just simply paid no further attention, other than those things you just scan quickly as you look at it. I didn't look at it to remember it". Thereupon each of the jurors who had admitted reading newspaper articles modified his admission to conform with what had just been said. One of them observed: "I can say about the same thing. I paid little attention to the accounts in the headlines, knowing it don't mean nothing to me, what is in the paper. I use my own judgment". Two jurors then said: "I am the same". Four others stated: "I have been doing the same".

The judge then emphasized to the jury the importance of deciding solely on the basis of the testimony in court. He also stressed the gross impropriety of newspaper, radio and television reports containing derogatory information about the defendants on trial. Having thus sought to minimize the risk of prejudice to the defendants the court denied the defendants' motion for a mistrial.

It is indisputable that when jurors are allowed to disperse from day to day during a long much publicized trial there is danger that they will be subjected to improper influences. When derogatory materials about the defendants are published in daily newspapers in communities where the jurors live the likelihood of prejudice to the defendants often becomes so great that corrective action is required. *Griffin v. United States*, 3d Cir. 1924, 295 Fed. 437. The problem is to decide when and whether a situation has developed in which a court should not risk any corrective less drastic than a new trial.

Marshall v. United States, 1959, 360 U. S. 310, is a significant new development of the law in this area. In that case, during a criminal trial some jurors had "read" and others had "scanned" articles prejudicial to the defendants. But, examined separately and apart from their fellow jurors, each of them assured the court that he had

not been influenced by the articles in question and could put them out of mind in reaching a decision on the evidence. Before the *Marshall* decision various courts had held that this sort of assurance combined with impressive judicial admonition was enough to make unassailable a decision of the trial judge that the defendants had suffered no serious prejudice from adverse newspaper stories and that there was no sufficient reason for declaring a mistrial. *E.g., United States v. Leviton*, 2d Cir. 1951, 193 F. 2d 848; *United States v. Carruthers*, 7th Cir. 1945, 152 F. 2d 512. But in the *Marshall* case the Supreme Court, ignoring this older line, said that this kind of "exposure of jurors to information of a character . . . so prejudicial that it could not be directly offered as evidence" was in itself enough to require a new trial. 360 U. S. at 312. And see the foreshadowing concurrence of Mr. Justice Jackson and Mr. Justice Frankfurter in a somewhat similar, though clearer, situation in *Shepherd v. Florida*, 1951, 341 U. S. 50.

In the present case, if the jurors had adhered to their first admissions of reading newspaper accounts of the trial, the *Marshall* rule would unquestionably have required that a new trial be ordered. If this case is significantly different from *Marshall*, the difference must be found in the fact that the jurors so modified their original admissions as to indicate only a minimal contact with or observation of articles published about the trial. Two circumstances deserve special mention in this connection. The judge at no time examined individual jurors out of the presence of their colleagues. Each was in position to be influenced by what his colleagues had said about paying little attention to the articles. Second, even in the general questioning of the entire jury there was no inquiry, much less a searching cross-examination, to obtain any explanation of the jurors' uniform modification of original admissions in order to adopt what a colleague had been heard to say about merely reading "headlines" and "those things you just scan quickly as you look at it". On its face this conduct gives

the impression of an effort to escape or minimize possible criticism of their reading about the trial rather than a genuine recollection that admissions made only minutes earlier were mistaken. In these circumstances I think that the change of position by the jurors does not to any really significant extent diminish the great likelihood of prejudice disclosed when on first inquiry so many of them admitted that, contrary to the court's earlier admonition, they had read newspaper accounts of the trial. And because I read the *Marshall* case as meaning that very substantial risk of prejudice in all the circumstances, rather than clear affirmative demonstration of prejudice in fact, is enough to require a mistrial when jurors have been exposed to inadmissible and derogatory publications about a person on trial, I think the *Marshall* rule strongly supports the appellants' demand for a new trial here.

Finally, even in the absence of direct evidence that jurors have read the publications in question, early decisions in this circuit have taken the position that there is a strong logical inference that jurors permitted to separate during a trial have seen or learned of derogatory material about the defendants which has appeared conspicuously during the trial on the front page of a local daily paper. In *Meyer v. Caldwallader*, C. C. E. D. Pa. 1891, 49 Fed. 32, 36, Circuit Judge Acheson said:

> "It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications."

In *Griffin v. United States*, 3d Cir. 1924, 295 Fed. 427, the only evidence that a single derogatory front page newspaper story about the defendant had come to the attention of the jury was testimony that one juror had been seen

with a copy of that paper in his possession. The court held that a new trial should have been granted.

These uncompromising rulings of our predecessors in this circuit are old. The Supreme Court ruling in the *Marshall* case is very new. In sum they provide what to me are convincing reasons for directing a new trial in the circumstances of the present case.

The judgment should be reversed and the cause remanded for dismissal as to Giordano and new trials in the cases of the other appellants.

Chief Judge Biggs and *Circuit Judge Kalodner* concur in the views expressed in this dissenting opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,136.

UNITED STATES OF AMERICA

v.

VICTOR CARLUCCI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges*.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF, *Clerk*.

March 2, 1961.